

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

**REPLY COMMENTS OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
ON NOTICE OF PROPOSED RULEMAKING**

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I. INTRODUCTION AND SUMMARY

The Office of the Ohio Consumers' Counsel ("OCC")¹ files these reply comments in response to certain of the initial comments filed with the Federal Communications Commission ("Commission") on the August 20, 2004 Notice of Proposed Rulemaking ("*NPRM*") in these dockets.² The *NPRM*, *inter alia*, "encourage[d] state commissions and other parties to file summaries of the state proceedings" that had been commenced in response to the Commission's *Triennial Review Order*.³

The OCC responds here to the comments filed by the Public Utilities Commission of

¹ The OCC is the state agency designated by Ohio law to represent the interests of residential utility consumers before state and federal regulators and in the courts. See Ohio Rev. Code Chapter 4911.

² FCC 04-179 (rel. August 20, 2004). The *NPRM* was published in the Federal Register on September 13, 2004. See 69 Fed. Reg. 55111.

³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), ¶¶ 187-190, 328-340, 394-418, 486-527, *corrected by* Errata, 18 FCC Rcd 19020 (2003).

Ohio ("PUCO"), by SBC Communications, Inc. ("SBC") and by the Verizon telephone companies ("Verizon"). The PUCO's comments set forth the circumstances of the PUCO's proceedings, in which the Commission had required the states to make decisions on unbundled network elements ("UNEs") based on the conditions set in the *Triennial Review Order*. But the PUCO also takes positions on, and expresses opinions on, unbundled local switching ("ULS") as part of the unbundled network element platform ("UNE-P"). The PUCO's views, however, are contradicted by the record in the PUCO's *Triennial Review Order* proceedings and by other facts in the possession of the PUCO.

SBC's comments and Verizon's comments take positions on the impairment of competitors without access to ULS that are the very contradiction of the directives of *USTA I* and *USTA II* that an impairment analysis must be "granular" and "nuanced."⁴ More importantly for purposes of this reply, SBC's position on impairment for ULS is contradicted by the record of the PUCO proceedings, as detailed in the OCC's initial comments. SBC's version of that record⁵ is woefully incomplete. And Verizon's national claims for ULS are directly contradicted by the situation in the territory of Verizon's Ohio local affiliate, which did not even attempt to challenge the FCC's national finding of impairment for mass market ULS.

Neither the PUCO's, nor SBC's, nor Verizon's comments, nor any of the other initial comments, disturb the OCC's position that the record of the three PUCO cases in which the OCC

⁴ *United States Telecom Ass'n v. FCC*, 290 F.3d 414, 426 (D. C. Cir. 2002) ("*USTA I*"); *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 564 (D.C. Cir. 2004) ("*USTA II*"). These issues are addressed at greater length in the reply comments of the National Association of State Utility Consumer Advocates ("NASUCA"). The OCC is a member of NASUCA.

⁵ SBC Comments, Attachment A-OH.

participated⁶ is sufficient for this Commission to find that, for residential customers, there is impairment for ULS throughout the SBC Ohio and Cincinnati Bell Telephone Company ("CBT") territories.⁷ And the fact that none of the other incumbent carriers in Ohio saw fit to challenge the Commission's national finding of impairment for ULS means that the Commission should find impairment in their territories as well.

The comments also do not disturb the OCC's conclusion that the Commission's consolidation of residential and small business customers into a single "mass market" product market improperly masked the lack of facilities-based competition for residential customers with the relatively greater degree of such competition for small business customers. Any truly granular analysis should address residential and small business customers as separate product markets.⁸

II. RESPONSE TO PUCO COMMENTS

There are many portions of the PUCO's comments that are reasonable and correct. From the recognition that the factors for determining impairment are "largely fact intensive or specific to a particular geographic region or market"⁹ to the notion that the Commission should "take the

⁶ PUCO Case Nos. 03-2040-TP-COI, *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching* ("PUCO Case 03-2040"); Case No. 04-34-TP-COI, *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching in SBC Ohio's Mass Market*, ("SBC Ohio Case"); PUCO Case No. 04-35-TP-COI, *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching in Cincinnati Bell Telephone Company's Mass Market* ("CBT Case").

⁷ As noted by the OCC, a more limited finding of nonimpairment would apply for service to small business customers.

⁸ See OCC Comments at 12-18; see also NASUCA Comments at 15-18.

⁹ PUCO Comments at 1.

time to develop a defensible approach,”¹⁰ the PUCO says much that the OCC supports.

At the end, however, the PUCO makes statements about the UNE-P that are not supported by the material supplied to the PUCO by SBC Ohio. The PUCO states, “although there has been some mass market participation by CLECs [competitive local exchange carriers] using the UNE-P in Ohio, it has fluctuated and has not proven to be a sustainable long-term market strategy.”¹¹

SBC Ohio has had to make reports on the level of local exchange competition in its territory in two different proceedings, as a result of two separate PUCO orders. The first reports were the result of conditions placed on the PUCO’s approval of the SBC/Ameritech merger.¹² This was a series of four annual reports that began in September 1999 and ran through September 2002.

The second reports were ordered in the pending proceeding to set SBC Ohio’s UNE prices.¹³ In March 2004, the PUCO authorized interim increases in SBC Ohio’s UNE loop rates, amounting to an average of a 32% increase that went into effect in May 2004. The PUCO also required SBC Ohio to provide bimonthly reports on competition in its territory, purportedly in order to gauge the impact of the rate increases. The first report was filed in July 2004, and included data from May 2004. A second report was filed on September 1, 2004 and included

¹⁰ Id. at 17.

¹¹ Id. at 18.

¹² *In the Matter of the Joint Application of SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, and Ameritech Ohio for Consent and Approval of a Change of Control*, Case No. 98-1082-TP-AMT, Opinion and Order (April 8, 1999) at 22-24; available at <http://dis.puc.state.oh.us/dis.nsf/0/64556E700467210C85256A4700702C4D?OpenDocument>.

¹³ *In the Matter of the Review of SBC Ohio’s TELRIC Costs for Unbundled Network Elements*, PUCO Case No. 02-1280-TP-UNC, Finding and Order (March 11, 2004) at 11; available at <http://dis.puc.state.oh.us/cgi-bin/CMWebCGI.exe?ItemID=XW5XKT3+LPK+PQPJ>.

data from June and July 2004.

Here is what those reports and other information say about the use of UNE-P in SBC

Ohio territory:

Month	Total UNE-P	Total residential UNE-P
September 2000 ¹⁴	0	0
September 2001 ¹⁵	40,000	32,000
September 2002 ¹⁶	316,000	252,800
September 2003 ¹⁷	645,343	N/A
May 2004 ¹⁸	689,935	576,535
June 2004 ¹⁹	684,215	568,936
July 2004 ²⁰	674,831	557,494

Clearly, until the PUCO authorized an interim rate increase while *USTA II* had heightened the uncertainty in the national telecommunications markets, the “fluctuations” in Ohio UNE-P were increases. The PUCO apparently fails to recognize that, as presented in the February 2003 NASUCA ex parte, more than 90% of the residential competition in SBC Ohio’s territory is based on the UNE-P.

Indeed, the source of the PUCO’s estimation of “fluctuation” or “unsustainability” is

¹⁴ Data from “Year 2000 Competition Report Using the Diagnostic Method for Assessing Competition, March 31, 2003, In Fulfillment of Section XII of the Stipulation and Recommendation Case No. 98-1082-TP-AMT,” at 25. This information was filed as confidential under a PUCO protective order; however, such orders expire after eighteen months. Further, as shown elsewhere in the chart, SBC Ohio has subsequently filed the same type of information without requesting confidentiality.

¹⁵ Data from “Year 2002 Competition Report Using the Diagnostic Method for Assessing Competition, March 31, 2003, In Fulfillment of Section XII of the Stipulation and Recommendation Case No. 98-1082-TP-AMT,” at 25. See previous footnote regarding confidentiality.

¹⁶ Id.

¹⁷ SBC Comments, Attachment A-OH, Exhibit 10, Part 3, at [1].

¹⁸ Data from SBC Ohio “The Status of Competition in Ohio, Special Report for May 2004,” dated July 29, 2004 in Case No. 02-1280-TP-UNC.

¹⁹ Data from SBC Ohio “The Status of Competition in Ohio, Second Quarter 2004,” dated September 1, 2004 in Case No 02-1280-TP-UNC.

²⁰ Id.

entirely unclear. There has been no Ohio proceeding in which the level of UNE-P competition in Ohio has been assessed. The PUCO has not requested comment on the question of whether the UNE-P is or is not a sustainable long-term market strategy.

The same can be said for the PUCO's views on facilities-based competition. The finding that "an important consideration in designating UNEs should be whether facilities-based competition is promoted"²¹ is not based on any PUCO proceeding. The PUCO has never taken comment on the question of whether the benefits to consumers from UNE-P-based competition exceed the long-term possible benefits from the construction of new facilities -- assuming that those facilities will even be built.

Certainly, the PUCO cites no factual support for any of these statements. On the other hand, the PUCO cited as the factual support for its opinions in the UNE Remand proceeding that -- as of May 1999 -- there were more than 20 CLEC switches in Ohio and approximately 14 "facilities based operation" CLECs purchasing UNEs from incumbent local exchange carriers ("ILECs").²² If the PUCO's view had prevailed, and this statewide, "non-nuanced" approach had been adopted in 1999, the hundreds of thousands of Ohio residential customers who have benefited from UNE-P competition in the ensuing years would have never seen those benefits.

It should be noted that the PUCO's views as expressed in the May 1999 comments and currently were not consistent with this Commission's findings on local switching in the subsequent *UNE Remand Order* or the *Triennial Review Order*. As the OCC's comments showed, based on the record of the Ohio impairment proceedings resulting from the *Triennial*

²¹ PUCO Comments at 18.

²² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, Comments of the Public Utilities Commission of Ohio (May 26, 1999) ("*PUCO UNE Comments*") at 7.

Review Order, there was impairment for local switching for residential customers throughout SBC Ohio's and CBT's territories under the Commission's impairment tests.²³

III. RESPONSE TO SBC AND VERIZON COMMENTS

A. SBC

The OCC's reply comments here focus exclusively on SBC's comments on unbundled local switching to serve the mass market.²⁴ The OCC will also discuss briefly SBC's rendition of the record of the Ohio impairment proceedings.²⁵

To begin, SBC recites national statistics that it claims show that there is no impairment for local switching.²⁶ Recognizing that these numbers say little about the mass market, SBC then makes the claim that "three million [mass market customers] are being served by CLEC switches combined with unbundled local loops," citing the so-called *UNE Fact Report*.²⁷ Apparently, a national finding of impairment is not possible, and not granular enough; but a national finding of non-impairment is acceptable. SBC is wrong.

SBC's analysis looks at switch-based competition on a Metropolitan Statistical Area ("MSA")-wide basis.²⁸ As the results of the Ohio proceedings showed, at least for Ohio, the

²³ OCC Comments (October 4, 2004) at 33-36. No other Ohio ILEC saw fit to or had a colorable case to challenge the Commission's national impairment findings.

²⁴ SBC Comments at 38-60.

²⁵ *Id.* at 43, n. 135. For reasons explained in the motion for extension of time filed by NASUCA and the OCC on October 14, 2004, the OCC did not obtain a copy of Attachment A to SBC's comments until the day before the reply comments were to be filed.

²⁶ *Id.* at 39-41.

²⁷ *Id.* at 42.

²⁸ *Id.*

MSA is far too large to use as a granular geographic market.²⁹ SBC's analysis would find impairment throughout an MSA if there was one CLEC serving mass market customers with its own switch anywhere in the MSA.

In fact, SBC also argues that the Commission's "multi-competitor standard was unlawful..."³⁰ This is based on SBC's proposition that

A test based on the existence of multiple facilities-based providers does not ask whether the relevant facility is "suitable" for competitive supply, but rather asks whether the market is *already* fully competitive. ... Section 251(d)(2)(B) focuses on the "ability" of competitors to provide service, not whether they are already providing service ubiquitously. And the fact that an efficient ... competitor is providing service with its own facilities in a number of markets necessarily shows that an efficient carrier is "able" to provide such service in other markets with those same characteristics.³¹

It is difficult to know where to begin to counter this "legal" argument, unaccompanied as it is by anything but a citation to the statute. SBC's argument has nothing to do with the "ordinary and fair" meaning of impairment.³²

It should suffice to say that the existence of a single competitor serving a few small business customers in a wire center within an MSA does not show that CLEC-owned switching is suitable for competitive supply throughout the MSA. It should also suffice to note that SBC has in no way identified the characteristics that would define markets such that the existence of a facilities-based competitor in a market "with those same characteristics" would preclude unbundling.

In Attachment A to its comments, SBC includes what it calls a summary of the Ohio

²⁹ See OCC Comments at 26-29.

³⁰ SBC Comments at 42.

³¹ Id. at 29-30.

³² *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 389-390 & n.11 (1999).

Triennial Review Order proceedings. SBC's summary is, at base, a summary of only SBC Ohio's position in those proceedings. The OCC focuses here on SBC's discussion of the mass market switching proceedings.

First, SBC acknowledges that it challenged the Commission's impairment finding in only "10 of the 23 PUCO-defined markets...."³³ Clearly, in the remaining 13 markets in the four MSAs, SBC Ohio did not challenge the impairment finding. Neither did SBC Ohio challenge the impairment finding for any of its markets outside those four MSAs.

SBC states that in the Ohio proceedings, its "evidence and analysis necessarily were tied strictly to the *TRO*'s now-vacated rules and standards."³⁴ This may be true; but among those standards was the one that said there was impairment if CLEC service is uneconomic in the absence of unbundling.³⁵ SBC Ohio decided not to present such an analysis for any of its markets, much less any of the markets where it claims that CLECs are capable of serving mass market customers with their own switches."³⁶

SBC continues to support the use of MSAs as geographic markets.³⁷ SBC's claims do not actually dispute the various bases for the PUCO's definition of the markets as contiguous wire centers within SBC Ohio's rate bands.³⁸ The OCC's initial comments addressed the many reasons why MSAs, specifically MSAs in Ohio, should not be used as geographic markets in

³³ SBC comments, Attachment A-OH at 2.

³⁴ *Id.*

³⁵ *Triennial Review Order*, ¶ 35.

³⁶ SBC comments, Attachment A-OH at 2.

³⁷ *Id.* at 6.

³⁸ See *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching* ("03-2040"); PUCO Case No. 03-2040, Opinion and Order (January 14, 2004) at 24; accessible at [http://dis.puc.state.oh.us/cgi-bin/CMWebCGI.exe?ItemID=SIY7\\$JQHWDI6IL\\$W](http://dis.puc.state.oh.us/cgi-bin/CMWebCGI.exe?ItemID=SIY7$JQHWDI6IL$W).

which impairment is measured.³⁹

Whether in its own proposed geographic markets or in the PUCO-determined markets, SBC Ohio describes how it counted the CLECs it claims were providing service to mass market customers.⁴⁰ For the many reasons set forth in the OCC's Comments,⁴¹ SBC Ohio's counts of CLECs qualifying for the Commission's triggers⁴² are vastly overstated. For residential customers particularly, the trigger was not met anywhere in SBC Ohio territory.⁴³

SBC states that "[n]o other party filed testimony concerning the trigger analysis."⁴⁴ This is not surprising given SBC's acknowledgement that it "filed testimony... but before other parties' testimony was due, the PUCO issued an order holding the case in abeyance in light of *USTA II*."⁴⁵ SBC Ohio's witnesses were not placed under oath, its testimony was not subject to cross-examination, and only its testimony had been filed. SBC Ohio's testimony is not due any particular weight.

B. Verizon

Verizon's comments show the irony in the Regional Bell Operating Companies' ("RBOCs") blanket claims of non-impairment. Verizon says affirmatively that there is no

³⁹ OCC Comments at 26-29.

⁴⁰ SBC Comments, Attachment A-OH at 8-11.

⁴¹ OCC Comments at 33-34; *id.*, Affidavit of Dr. Ben Johnson; *id.*, Affidavit of Karen Hardie; *id.*, Affidavit of Kathy Hagans.

⁴² SBC Comments, Attachment A-OH at 3-4, 8.

⁴³ See footnote 41, *supra*.

⁴⁴ SBC Comments, Attachment A-OH at 11.

⁴⁵ *Id.* at 1.

impairment for unbundled local switching.⁴⁶ Verizon relies, for the most part, on intermodal alternatives, such as wireless and Voice over Internet Protocol (“VoIP”). Yet nowhere in Verizon’s material is there any showing that these alternatives are available in Verizon North Inc.’s rural territory in Ohio, with exchanges in 80 of the 88 Ohio counties but where the largest community served is Marion (population 35,000⁴⁷). Many portions of Verizon’s Ohio territory are notorious for the lack of adequate cellular service. And Verizon North is the only large Ohio ILEC that has not yet signed up for an elective alternative regulation plan that requires a showing that broadband service is available in a limited part of the service territory. Specifically, there has been no showing that VoIP is actually available to most Verizon Ohio customers.

It is particularly ironic that Verizon feels comfortable supporting a national finding of nonimpairment for unbundled local switching to serve the mass market, when its local affiliate in Ohio did not seek to challenge this Commission’s national finding of impairment. There was no challenge based on the actual deployment of CLEC switching facilities in Verizon Ohio territory. Neither was there a challenge based on a claim that CLECs could economically provide local switching in Verizon Ohio territory -- even if there was no actual deployment.

IV. CONCLUSION

The PUCO, SBC and Verizon all depend on this Commission abandoning the nuanced approach to unbundling that the *USTA I* and *USTA II* courts required, seeking general findings that avoid looking at the specifics of specific markets. The PUCO also attempts to sweep under the rug the significant level of competitive opportunity that unbundled local switching has

⁴⁶ See Verizon Comments at 85.

⁴⁷ See <http://marionoh.usl.myareaguide.com/census.html>.

brought to residential customers in SBC Ohio territory. The PUCO's general statements are refuted by facts that the PUCO has in its possession.

SBC and Verizon, on the other hand, seek to be totally relieved of unbundling obligations as a result of spotty CLEC appearance in some markets. Both RBOCs would overturn the *Triennial Review Order* far beyond what was required by the D.C. Circuit.

As discussed in the OCC's initial comments, the Commission should find that the residential product market for switching should be reviewed separately from the small business market. Only in this fashion will the greater competitive facilities-based opportunities for small business customers not mask the limited or non-existent service to residential customers through CLEC switches.

Further, the Commission should, for Ohio, adopt the geographic markets proposed by the PUCO (and as modified by the OCC), which consist of contiguous clusters of wire centers that have relatively homogeneous characteristics. Certainly, the Commission should not adopt larger geographic markets, such as MSAs, Local Access Transport Areas, or entire ILEC territories within the state. Both SBC and Verizon depend on the use of such large markets, including the existence of a single national market.

The OCC recommended that the Commission should determine for Ohio that the impairment finding stands for those ILECs that did not challenge the Commission's impairment finding for mass market switching. Those ILECs must unbundle local switching. The same principle should apply to the markets/wire centers of SBC Ohio and CBT where those ILECs did not challenge impairment. SBC Ohio and CBT should be required to unbundle local switching in those markets.

In the end, the Commission should find that, for residential customers, SBC Ohio has

failed to demonstrate a lack of impairment -- because of the lack of switched-based CLECs servicing those customers -- in any of the markets where SBC Ohio challenged the impairment finding. Even for the mass market as a whole, impairment exists in only four SBC Ohio markets, based on the Commission's competitive triggers.

CBT, of course, can only point to minimal CLEC switched-based activity in its territory. This is surely the result of the fact that -- as demonstrated by running CBT's witness' models with more reasonable assumptions -- the net present value of such competitive service is negative in all of CBT's challenged markets. The Commission should also find impairment throughout CBT territory.

These findings would be entirely consistent with the 1996 Telecommunications Act, the decisions of the United State Supreme Court regarding the unbundling obligations under the Act, and, in fact, the D.C. Circuit's pronouncements in this area. The RBOCs read "impairment" as "impossibility"; this is not consistent with the ordinary and fair meaning of the Act that the Supreme Court relied on.

Respectfully submitted,

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